

# Insurance Quarterly Legal and Regulatory Update

**Period covered:**  
1 January 2013 to 31 March 2013

DILLON  EUSTACE

DUBLIN CAYMAN ISLANDS HONG KONG NEW YORK TOKYO

**Table of Contents**

	<b>Page</b>
1. Solvency II	2
2. EIOPA Updates	3
3. Central Bank of Ireland	5
4. Health Insurance	8
5. Pensions Update	9
6. Data Protection	10
7. Anti- Money Laundering/Counter-Terrorism Financing	11
8. Finance Bill 2013	15
9. Companies Bill 2012	15
10. Contact Us	18





## INSURANCE QUARTERLY LEGAL AND REGULATORY UPDATE

### Solvency II

#### (i) **Solvency II Implementation Timeline**

Following the publication of EIOPA's Opinion on Interim Measures, the Central Bank of Ireland (the "Central Bank") has confirmed that full implementation of Solvency II will be delayed beyond the implementation date of 1 January 2014 set out in the "Quick Fix" Directive (2012/23/EU). To date, there is no publicly available revised timetable for the implementation of Solvency II, however, the Opinion published by EIOPA proposes that national competent authorities should introduce certain aspects of the prospective and risk-based supervisory approach in order to promote supervisory convergence.

These proposals cover:

-  An effective system of governance;
-  An effective risk-management system including a forward looking assessment of the undertaking's own risk (based on ORSA principles);
-  The pre-application of internal models; and
-  Reporting to supervisors.

#### (ii) **Omnibus II Directive**

The draft Omnibus II Directive amends the Solvency II Directive to take account of the changes introduced by the Lisbon Treaty and also the new financial supervision measures introduced in the EIOPA Regulation (Regulation 1094/2010). Adoption of this Directive requires agreement from the Trialogue parties (the European Parliament, the Council of the EU and the European Commission). The negotiations on this Directive have been further delayed as a result of the Long Term Guarantee Assessment (see section (ii) of EIOPA Updates below) and as such the plenary vote of the Omnibus II Directive has been rescheduled from 10 June 2013 to 22 October 2013.

For forecast updates please see the link below:

<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=589513>

## EIOPA Updates

### (i) **EIOPA launches public consultation on guidelines related to the preparation for Solvency II**

As a follow up to the Opinion on Interim Measures issued in December 2012, EIOPA intends to publish guidelines later this year addressed to competent authorities on how to proceed in the interim phase leading up to the introduction of Solvency II. On 27 March 2013, EIOPA launched its public consultation on these guidelines which covers the areas of:

- ▣ The system of governance;
- ▣ The forward looking assessment of the undertaking's own risks (based on the ORSA principles);
- ▣ The submission of information to national competent authorities; and
- ▣ The pre-application for internal models.

EIOPA welcomes comments from all interested parties and these comments should be submitted before the deadline of 19 June 2013. EIOPA intends to publish the responses to this consultation in the Autumn.

Within two months of publication of the finalised guidelines, competent authorities must confirm whether they comply or intend to comply with the guidelines. If the competent authority does not comply, or does not intend to comply, it must inform EIOPA, stating the reasons for non-compliance.

These consultation papers can be found at the following link:

<https://eiopa.europa.eu/consultations/consultation-papers/index.html>

### (ii) **EIOPA launches long term guarantee assessment**

EIOPA launched the long term guarantee assessment ("LTGA") impact study agreed by the Trilogue parties (the European Parliament, the Council of the EU and the European Commission) in the context of the Omnibus II Directive negotiations on 28 January 2013.

The stated goal of the LTGA is to assess the effects that the implementation of the various elements of the package may have on policyholders and beneficiaries, insurance and reinsurance undertakings, supervisory authorities and the financial system as a whole.

The four key areas covered in the LTGA include:

- ▣ Extrapolation methodology;
- ▣ Counter cyclical premium;
- ▣ Matching adjustment; and
- ▣ Transitional requirements from Solvency I discount rate to Solvency II.

The Central Bank has selected a sample of life and non-life undertakings to participate and it was expected that these undertakings would submit results by 31 March 2013. A report containing the LTGA technical findings and EIOPA's conclusions is due to be published in June 2013.

**(iii) EIOPA publishes report on good practices related to the provision of information for defined contribution schemes**

On 22 February 2013 EIOPA published a report on good practices related to the provision of information for defined contribution schemes. The main purpose of this report is to adopt a new approach to the provision of information to enable members to plan for retirement and make appropriate financial decisions.

This is an 'own-initiative' project by EIOPA and it was undertaken in the context of the review of the IORP Directive. The report recommends a layering approach to the provision of information whereby members can derive answers to key questions from the first layer and then obtain information on more complex issues in subsequent layers.

The report can found at the following link:

<https://eiopa.europa.eu/publications/reports/index.html>

**(iv) EIOPA publishes report on the functioning of colleges of supervisors and the Action Plan 2013**

On 29 January 2013, EIOPA published its annual report on the functioning of supervisory colleges and the Action Plan 2013. According to this report, EIOPA attended almost all college meetings for 75 out of the 78 insurance cross border groups. Some of EIOPA's main observations were that:-

- ▣ Supervisors were making great efforts towards the implementation of Solvency II, in particular in relation to the pre-application process for internal models despite uncertainty around the implementation date for Solvency II; and
- ▣ Differences in relation to information exchange and approaches to risk assessment and analysis existed.

In this context, the aim of EIOPA's Action Plan 2013 is to promote consistency of supervision and a level playing field for cross-border groups during the period until Solvency II implementation by developing a common understanding of risks and on the further alignment of work on the pre-application of Internal Models in the period leading up to Solvency II.

The report can be found at the following link:

<https://eiopa.europa.eu/publications/reports/index.html>

**(v) EIOPA and World Bank sign agreement to cooperate on developing global insurance sector**











On 15 March 2013, EIOPA and the World Bank signed a memorandum of understanding to cooperate on developing the global insurance industry through promoting risk based supervision and consumer protection worldwide.

## Central Bank of Ireland

**(i) Central Bank Enforcement Priorities in 2013**

On 12 February 2013, the Central Bank published its enforcement priorities for 2013 which highlight the importance of enforcement within its risk-based regulatory framework (PRISM).

The Central Bank intends to pursue enforcement actions across a number of areas, including non-compliance identified by their Supervisory Divisions in the following enforcement priority areas for 2013:

-  Retail Intermediaries;
-  Payment Protection Insurance;
-  Client Asset Requirements;
-  Prudential Requirements;
-  Anti-Money Laundering and Counter Terrorist Financing;
-  Systems and Controls;
-  Timeliness and Accuracy of Information submitted to the Central Bank;
-  Errors and Overcharging;
-  Payment Services Regulations; and
-  Suitability Requirements (Consumer Protection Code - 2012).

This list of enforcement priorities comprises the priority areas highlighted in 2012 and the inclusion of three new priority areas relating to ‘errors and overcharging’, ‘payment services regulations’ and ‘suitability requirements (Consumer Protection Code – 2012)’.

The Central Bank has advised that enforcement actions taken in 2013 will not relate solely to these ‘pre-defined’ enforcement priorities, but will also encompass ‘reactive’ enforcement in respect of issues identified through day-to-day supervisory work and from other information sources.

## **(ii) Central Bank Programme of Themed Reviews for 2013**

On 12 February 2013, the Central Bank also published its planned series of themed reviews and inspections for 2013. Themed reviews and inspections form part of the Central Bank’s supervisory framework allowing for review, assessment, transparency and mitigation of risks which have emerged in various industry sectors and across individual firms. They may also form the basis for the Central Bank taking regulatory or enforcement action where necessary. The publication of planned themed inspections enables the relevant sectors to prepare and raise standards by identifying and highlighting both good and poor practices across the firms in each sector.

The main themes for 2013 include:

- ▣ Code of Conduct on Mortgage Arrears;
- ▣ Sales incentives in the banking, insurance, investment and stockbroking sectors;
- ▣ Provision of information to consumers by investment and stockbroking firms;
- ▣ Property insurance claims handling;
- ▣ Retail intermediaries compliance (insurance, investment and mortgage intermediaries);
- ▣ Moneylenders;
- ▣ Outsourcing;
- ▣ Post-authorisation application of business plans to delegating UCITS and non-UCITS managers;
- ▣ Client assets;
- ▣ Review of governance on pricing procedures;
- ▣ Data integrity of regulatory returns; and
- ▣ Anti-Money Laundering, Countering the Financing of Terrorism and Financial Sanctions.

In addition to the planned series of inspections, the Central Bank will also continue to conduct additional reactive inspections on key issues and themes as they arise throughout the year.

**(iii) The Central Bank signs the IAIS Memorandum of Understanding**

On 14 February 2013, the Central Bank became the latest signatory to the International Association of Insurance Supervisors Multilateral Memorandum of Understanding on Cooperation and Information Exchange (the “IAIS MMoU”).

This IAIS MMoU establishes a formal basis for cooperation and information exchange between the various signatory authorities regarding the supervision of insurance companies where cross-border aspects arise such as licensing, ongoing supervision and winding-up processes.

The IAIS MMoU can be found at the following link:

<http://www.iaisweb.org/MMoU-381>

The full list of signatories can be found at the following link:

<http://www.iaisweb.org/MMoU-signatories-605>

**(iv) Central Bank publishes report on the Retail Intermediary Sector in Ireland**

On 28 February 2013, the Central Bank published a report on the Retail Intermediary Sector in Ireland. This report gives an overview of this sector in Ireland, the Central Bank’s supervisory approach to this sector and some of the key issues and risks facing the sector and its customers.

The report can be found at the following link:

<http://www.centralbank.ie/regulation/industry-sectors/retailintermediaries/Pages/WhatsNew.aspx?ListID=b7b20491-b2e8-4bc8-ab64-abb931f44beb&ListItemID=11>

**(v) Fitness and Probity Frequently Asked Questions**

The Central Bank issued a revised version of its Frequently Asked Questions on the Fitness and Probity Regime on 5 March 2013.

The revised document provides that PCFs who were in situ in a particular role at the time of introduction of the regime on 1 December 2011 will be required to go through the pre-approval process and submit an Individual Questionnaire (“IQ”) to the Central Bank when they are re-elected or re-appointed to that role.



For example, where a person held the position of chairman on 1 December 2011, that person was not required to submit an IQ to the Central Bank seeking approval at that time. Now, on re-appointment to that role, the chairman will be required to submit an IQ, though only for the first such re-appointment to that role provided there is no break in service.

This procedure will also apply to in-situ PCFs who are subject to employment contract renewals.

On 28 March 2013, the Central Bank issued another revised Fitness and Probity FAQ document which provides further clarification in relation to individuals who were in-situ at the time the regime was introduced. This clarification provides that the Central Bank does not require an IQ to be submitted for individuals who were in-situ at the time the regime was introduced and who have been re-elected or re-appointed in the interim period prior to the publication of the revised FAQs on 5 March 2013. However, an IQ will be required for re-elections/re-appointments made on/after 5 March 2013.

## Health Insurance

### (i) Health Insurance (Amendment) Act 2012

The Health Insurance (Amendment) Act was enacted on 26 December 2012 and provides for a new Risk Equalisation Scheme (the “RES”) for private health insurance in Ireland.

The aim of the RES is to neutralise the differences in health insurer’s costs arising as a result of the variations in the risk profiles of their customers. It seeks to achieve this aim by allowing for better risk sharing between insurers by compensating insurers with a worse-than-average risk profile in their portfolio.

On 20 February 2013, the European Commission approved the compensations to be granted through the RES. After assessing the RES under the EU Framework for State aid, the Commission found that the RES satisfies rules on services of general economic interest.

The Commission decided that the RES was justified as it was necessary to support the principles enforced by the Irish authorities that concern the private medical insurance market, namely:

- Community Rating: meaning that regardless of the age, health status or risk presented by an insured person, an insurer must apply the same premium for a specific level of cover;

- ▣ Open Enrolment: meaning that regardless of the age or health status of an applicant an insurer is obliged to accept any applicant who wishes to conclude an insurance contract; and
- ▣ Lifetime Coverage: meaning that an insurer cannot terminate the insurance contract against the will of the insured.

The new RES will operate for the period of 2013 to 2015.

## Pensions Update

### (i) Revised certification conditions for sovereign annuities

On 18 January 2013 the Pensions Board published revised certification conditions for sovereign annuities (i.e. an annuity contract issued by insurance companies where the annual income payment is linked directly to payments under bonds issued by Ireland or any other EU Member State) for both trustees and insurers.

The changes are said to reflect market developments regarding the type of bonds likely to underpin sovereign annuity products.

The updated FAQs for trustees are available at the following link:

[http://www.pensionsboard.ie/en/Regulation/Sovereign Annuities/FAQs for Trustees on Sovereign Annuities 2013.pdf](http://www.pensionsboard.ie/en/Regulation/Sovereign%20Annuities/FAQs%20for%20Trustees%20on%20Sovereign%20Annuities%202013.pdf)

The updated FAQs for insurers are available at the following link:

[http://www.pensionsboard.ie/en/Regulation/Sovereign Annuities/FAQs for insurers on Sovereign Annuities 2013.pdf](http://www.pensionsboard.ie/en/Regulation/Sovereign%20Annuities/FAQs%20for%20insurers%20on%20Sovereign%20Annuities%202013.pdf)

### (ii) Investment guidelines for trustees of defined contribution pension schemes

On 21 January 2013, the Pensions Board published investment guidelines for trustees of defined contribution pension schemes. The purpose of these guidelines is to help trustees in deciding which investment choices to make available for scheme members.

The guidelines can be found at the following link:

[http://www.pensionsboard.ie/en/Publications/Information Booklets/Investment Guidelines.pdf](http://www.pensionsboard.ie/en/Publications/Information%20Booklets/Investment%20Guidelines.pdf)

**(iii) Central Bank address to 'A future for the Life & Pensions Industry' conference**

On 31 January 2013, Mark Burke, Head of Life Insurance Supervision in the Central Bank, addressed the 'A future for the Life & Pensions Industry' conference. The focus of his speech was the prudential regulatory agenda in 2013 for life assurance companies and their business partners and how this may impact life assurance business. The full speech can be accessed here:

<https://www.centralbank.ie/press-area/speeches/Documents/130131%20-%20Address%20to%20Life%20Pensions%20Conference.pdf>

## Data Protection

**(i) European Parliament rapporteurs present draft reports on the Commission's reform proposals for data protection**

On 10 January 2013, European Parliament rapporteurs presented two draft reports on the Commission's proposals for a Data Protection Reform Package which includes a general Data Protection Regulation and a Directive for the law enforcement sector.

The implementation of the proposed new Data Protection Regulation will lead to a uniform and coherent data protection legal system across all Member States, whereby companies will only have to deal with the national data protection authority of the Member State in which they have their main establishment. However, the Data Protection Regulation will introduce stricter rules and procedures, which will involve many significant changes and costs for both EU and non-EU companies. As the Data Protection Regulation will be directly effective, preparations should be made as soon as possible to ensure compliance.

Overall, the European Parliament rapporteurs support the proposed package approach and the objectives of this reform package.

For more information the draft reports can be found at the following links:

Draft report on the proposal for a regulation:

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/pr/922/922387/922387en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf)

Draft report on the proposal for a directive:

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/pr/923/923072/923072en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/923/923072/923072en.pdf)

**(ii) Article 29 Working Party issues Opinion on Mobile Apps**

On 14 March 2013, the European data protection authorities of the Article 29 Working Party issued an opinion (dated 27 February 2013) on mobile apps. The Article 29 Working Party on the Protection of individuals with regard to the Processing of Personal Data is an independent advisory body on data protection and privacy, set up under Article 29 of the Data Protection Directive 95/46/EC and comprises representatives from the national data protection authorities of the EU Member States, the European Data Protection Supervisor and the European Commission.

Given the growing popularity of smart phones and the use of mobile apps, the Article 29 Working Party issued this opinion to highlight the key data protection risks of mobile apps such as the end users lack of transparency and awareness of the types of processing an app may undertake and also the lack of meaningful consent from end users before that processing takes place. The opinion also covers the specific obligations of app developers and all other parties involved in the development and distribution of apps under European Data protection law.

The Opinion can be found at the following link:

[http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp202_en.pdf)

## Anti-Money Laundering/Counter-Terrorism Financing

**(i) Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013**

The Department of Justice published the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013 (the “Bill”) on 31 January 2013. The purpose of this Bill is to amend the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the “Act”) in order to align certain provisions more closely with international standards and to amend certain provisions to reflect operational requirements.

Some of the proposed amendments include;

- ▣ Applying the definition of ‘occasional transaction’ where the aggregate of the transaction is less than €15,000 in the following situations:
  - Private members’ gaming clubs when an amount or value of €2,000 is reached;
  - Wire transfer funds within the meaning of Regulation (EC) No. 1781/2006 when an amount of €1,000 is reached.

- ▣ Section 34 of the Act, which deals with specified customers and specified products – i.e. the situations where simplified due diligence can be applied – is proposed to be amended whereby the designated person can only apply simplified due diligence to such customers/products where the designated person has taken steps to determine whether or not the customer or product is a specified customer or product;
- ▣ Section 37 of the Act to be amended such that the rules relating to politically exposed persons (“PEPs”) will be tightened. A designated person will need to perform ongoing monitoring on its customers to determine whether a customer obtains PEP status during the course of the business relationship and conduct source of wealth and source of funds checks on such customers. In addition, it proposes a requirement for ongoing monitoring of transactions with PEPs including ongoing monitoring of source of wealth and source of funds.
- ▣ Section 39 of the Act to be amended to require designated persons to apply additional customer due diligence measures where the designated person has reasonable grounds to believe that there is a higher risk of money laundering or terrorist financing. This is currently a discretionary requirement.
- ▣ Section 54 of the Act to be amended to require additional matters to be included in policies and procedures to prevent and detect the commission of money laundering and terrorist financing. These additional matters include:
  - Measures to be taken by designated person to keep customer due diligence documents and information up to date;
  - The additional measures taken to apply enhanced customer due diligence and the circumstances in which such measures will be taken;
  - Measures to be taken to prevent the risk of money laundering or terrorist financing which may arise from technological developments including the use of new products and practices.

The initial proposals for this Bill were contained in the draft heads for the Criminal Justice (Money Laundering and Terrorist Financing)(Amendment) Bill, 2012 (“2012 Heads”). The most notable difference is that the Bill omits a number of the provisions proposed under the 2012 Heads such as the amendment relating to the appointment of a Compliance Officer/MLRO with responsibility for AML and the amendment relating to the maintenance of records and the location of same.

**(ii) Commission publishes the proposed Fourth Anti-Money Laundering Directive and the proposed Regulation on the information accompanying the transfer of funds**

On 5 February 2013, the European Commission published the proposed Fourth Anti-Money Laundering Directive and the proposed Regulation on the information accompanying the transfer of funds to ensure that the EU Anti-Money Laundering framework remains fully compliant with international standards.

*Fourth Anti-Money Laundering Directive (“ Fourth AML Directive”)*

This Fourth AML Directive will repeal the third Anti Money Laundering Directive (2005/60/EC) and the implementing Directive (2006/70/EC).

Some of the main proposals include:

- ▣ *Risk based approach* - The Fourth AML Directive recognises that employing a risk-based approach is an effective way to identify and mitigate risks to the financial system and ensure wider economic stability in the internal market area and as such imposes risk assessment requirements on Member States and designated entities.
- ▣ *Customer Due Diligence* – the proposals under the Fourth AML Directive adopt a risk based approach to the application of customer due diligence measures. This involves the use of evidence based decision-making to target money laundering and terrorist financing risks and the level of customer due diligence applied will have to be justified on the basis of risk. As such, entities would be required to apply enhanced customer due diligence where risks are greater and simplified customer due diligence where risks are lower. The Directive provides for a list of the minimum factors which must be considered when making such decisions.
- ▣ *Reliance on Third Parties in Third Countries* - Under the current Directive, if a relevant third party is based in a third country which is deemed to have equivalent AML standards to the EU then a designated person can automatically rely on that relevant third party. However, under the Fourth AML Directive, the geographic risk will be one of the factors to be considered when determining whether or not to rely on a relevant third party. The location of the relevant third party in a third country that is deemed equivalent will not automatically qualify that party as a relevant third party.
- ▣ *Beneficial Owner* – The Fourth AML Directive provides for a clear mechanism to identify beneficial owners and requires legal persons to hold information on their own beneficial ownership. This information should be available to both competent authorities and designated entities.

- ▣ *PEPs* - The Fourth AML Directive expands the provisions relating to PEPs to include domestic politically exposed persons and persons entrusted with a prominent function by an international organisation.
- ▣ *Data Protection* - The proposals under the Fourth AML Directive introduce provisions to clarify the interaction between anti-money laundering/combating terrorist financing and data protections requirements.
- ▣ *European Supervisory Authorities (“ESAs”)* - The ESAs have been tasked with adopting regulatory technical standards and issuing guidelines in a number of areas of the Fourth AML Directive.
- ▣ *Cooperation*- The Fourth AML Directive introduces provisions for enhanced cooperation amongst Member States, the Financial Intelligence Units, the Commission and the ESAs.
- ▣ *Sanctions*- The Fourth AML Directive provides for minimum administrative measures and sanctions that can be applied in the case of a breach. It also provides for the publication of these sanctions or measures, subject to certain exceptions, that are imposed for breach of the national provisions adopted.
- ▣ *Extension of scope* - The proposals aim to broaden the scope of the Fourth AML Directive to cover gambling and also to reduce the threshold for traders in goods from €15,000 to €7,500 for cash transactions.

#### *Regulation on the information accompanying the transfer of funds (“Regulation”)*

This Regulation proposes to update the Funds Transfer Regulation (Regulation 1781/2006) which provides information about rules to be followed by the payer and the payee involved in transfers of funds so as to detect and deter crimes of money laundering and terrorist financing. The new Regulation is based to a large extent on the recommendations made by the Financial Action Task Force (“FATF”) and aims to improve traceability of payments and to ensure that the EU Framework remains fully compliant with international standards.

The new regulation will impose obligations on Payment Service Providers relating to:

- ▣ Information accompanying transfer of funds;
- ▣ Detection of missing information on the payer and the payee;
- ▣ Transfer of funds with missing or incomplete information on the payer and the payee; and
- ▣ Assessment and Reporting.

The new Regulation will also impose obligations on Intermediary Payment Service Providers relating to:

- ▣ Retaining information associated with the transfer – on the payer and the payee;
- ▣ Transfer of funds with missing or incomplete information on the payer and the payee; and
- ▣ Assessment and Reporting.

#### *Timeline*

The two proposals will have to be adopted by the European Parliament and the Council of Ministers under the ordinary legislative procedure. It is not yet clear when these proposals will be adopted. However, once adopted, Member States will then have two years to transpose the provisions of the Fourth AML Directive into national law. The Regulation will apply from the date of the transposition of the Fourth AML Directive.

#### Public conference

A public conference was held on 15 March 2013 where the main changes in the international framework as well as the new Directive was discussed among various groups of stakeholders.

## Finance Bill 2013

On 13 February 2013, the Finance Bill 2013 was published with the aim of further enhancing Ireland's financial services sector by introducing innovative measures that are intended to stimulate and sustain growth and ensure on-going competitiveness in the global financial services industry.

In relation to life assurance, the rates of exit tax applicable to certain Irish resident policyholders on profits and gains from domestic life assurance policies under the gross roll-up regime are proposed to increase by 3% whereby the new rate will be 36%. This increase in rate will also apply to life assurance policies in other EU Member States, EEA States and OECD countries with which Ireland has a double taxation treaty.

This Bill is likely to be enacted in the second quarter of 2013.

## Companies Bill 2012

The Minister for Jobs, Enterprise and Innovation, Richard Bruton published the Companies Bill, 2012 (the "Bill") on 21 December 2012. The Bill aims to reduce the costs associated with incorporating companies in Ireland and to reduce certain administrative red tape with which companies in Ireland must currently comply. It also proposes to make company law obligations



easier to understand. The Bill, which is issued in 2 volumes, proposes to consolidate the existing 16 Companies Acts, which date from 1963 to 2012, into a single Act.

Volume 1 will govern the private company limited by shares which account for over 90% of the companies in the State. Volume 2 will govern other corporate entities including public limited companies, unlimited companies and a new type of company the designated activity companies amongst other corporate forms.

The following significant reforms of Irish Company Law are proposed:

- ▣ The private company limited by shares will be the model company under the legislation (rather than the public company, as is currently the case);
- ▣ Currently a private company limited by shares must have two directors, one of which may also act as secretary. The Bill provides that a private company limited by shares will be permitted to have only one director, though in such circumstances the role of company secretary must be performed by another person;
- ▣ A single document constitution is envisaged replacing the current requirement for a memorandum and articles of association;
- ▣ The abolition of the doctrine of “ultra vires” which operates to render a contract, purportedly entered into by a company, void and unenforceable to the extent that it is not contemplated in the company’s memorandum of association. The private company limited by shares will be given the contractual capacity of a natural person;
- ▣ The codification of directors’ fiduciary duties and inclusion of a non-exhaustive list of fiduciary duties which a director owes to a company (e.g. the requirement to act in good faith, to avoid conflicts of interest etc); and
- ▣ A private company limited by shares may dispense with the requirement to hold an annual general meeting where the members unanimously agree to do so. The members will also be permitted to pass a majority written resolution.

Other proposed changes include:

- ▣ The simplification and removal of anomalies regarding to the various modes of winding up companies and the appointment of liquidators, examiners and receivers. New qualification requirements will be introduced for liquidators and mandatory indemnity insurance is proposed;

- ▣ Summary approval procedures” which will allow companies to carry out certain activities by means of a directors’ declaration and a shareholders’ resolution for those activities which under the current law would require High Court approval (for example, certain transactions with directors, capital reductions, and solvent windings up);
- ▣ New procedures regarding mergers and divisions;
- ▣ Implementing changes to section 45 of the Companies (Auditing and Accounting Act), 2003 which has not as yet come into effect. Directors of companies, unless otherwise exempted, will be required to provide a compliance statement and a related statement, the latter of which must confirm that there is material compliance with the company’s relevant obligations which will extend only to indictable offences under the Companies Acts and Irish tax law. The previous provisions of section 45 were unduly onerous and will be replaced with a less prescriptive approach as detailed in the Bill.
- ▣ Offences, subject to a small number of exceptions, will be categorised into a more streamlined four tier scheme.

The passage of the Companies Bill through the Houses of the Oireachtas will begin shortly with the Second Stage debate scheduled to begin on 23 April 2013. Once the Second Stage for the Bill is complete, work will begin on amendments for the next phase, the Committee Stage. In order to allow time for drafting, organising, briefing and getting the Minister’s and, where necessary, the Government’s, approval, the deadline for accepting proposals for amendments has been set for the end of June 2013. Any amendments proposed in relation to the Bill should be submitted before the end of June 2013.

### **Dillon Eustace**

**This Insurance Quarterly Legal and Regulatory Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter and, accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace.**

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